



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF S-N-M-A-, P.A.

DATE: AUG. 1, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a health care business, seeks to permanently employ the Beneficiary as a physician (nutrition and metabolic medicine) under the second preference immigrant classification of advanced degree professional. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent residence.

The Director, Texas Service Center, denied the petition. The Director found that the Petitioner did not establish its ability to pay the proffered wage of the job offered. The Director denied a subsequent motion to reopen.

The matter is now before us on appeal. The Petitioner has submitted a letter from counsel and asserts that previously submitted documentation establishes its continuing ability to pay the proffered wage from the priority date onward. Upon *de novo* review, we will dismiss the appeal.

I. PROCEDURAL HISTORY

The instant petition, Form I-140, Immigrant Petition for Alien Worker, was filed on March 12, 2015. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), which was filed with the U.S. Department of Labor (DOL) on June 19, 2014, and certified by the DOL on November 12, 2014. In section G of the labor certification, the Petitioner stated that the proffered wage for the job offered is \$162,739 per year. In section K of the labor certification, the Petitioner stated that it had employed the Beneficiary since August 31, 2013, for 4 hours a week in the job offered.

As evidence of the Petitioner's ability to pay the proffered wage, the Petitioner submitted copies of the following documentation with its Form I-140 and in response to the Director's request for evidence (RFE):

- The Beneficiary's IRS Form W-2, Wage and Tax Statement, for 2014;
- The Beneficiary's pay statements for January and February of 2015;
- The Petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2014;

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- The IRS Form 1040, U.S. Individual Income Tax Return, of the Petitioner's owner for 2014;
- A letter from the Petitioner's certified public accountant (CPA), dated February 26, 2015, explaining certain entries on the Petitioner's federal income tax return and the Beneficiary's Form W-2; and
- The Petitioner's bank account statement from [REDACTED] for February 2015.

On April 29, 2015, the Director denied the petition on the ground that the Petitioner did not establish its ability to pay the Beneficiary the full proffered wage. The Director noted that the Beneficiary's Form W-2 showed that his pay was only \$17,540 in 2014, which was \$145,199 below the proffered wage. The Director also noted that the Petitioner's federal income tax returns recorded modest net income of \$33,939 and net current assets of \$13,716 in 2013, followed by a net loss of -\$30,621 and net current liabilities of -\$25,971 in 2014. Thus, neither net income nor net current assets were sufficient to pay the full proffered wage to the Beneficiary. Finally, the Director noted that bank statements had been submitted, but found that the Petitioner's bank account assets did not reflect additional funds not already included in its tax returns. Based on the foregoing documentation, the Director found that the Petitioner did not establish its ability to pay the proffered wage in 2013 or 2014, and denied the petition on that ground.

The Petitioner filed a motion to reopen on May 29, 2015, accompanied by a letter from counsel and additional documentation including updated pay statements of the Beneficiary and bank statements of the Petitioner, and aging billing reports for the Petitioner. Claiming that it had the resources to pay the proffered wage, the Petitioner asserted that accounts payable of more than \$40,000 for claims filed with insurance companies in 2014 should be included in its current assets that year, and that compensation paid to the Petitioner's sole shareholder, [REDACTED] as income recorded on a Form W-2 (\$260,138 in 2014) were actually company profits that could have been utilized to help pay the full proffered wage to the Beneficiary that year.

On October 28, 2015, the Director dismissed the motion to reopen and affirmed his denial of the petition. With regard to the accounts receivable and updated bank statements, the Director found that these items became current assets in 2015 and must be balanced by the Petitioner's current liabilities in 2015, of which there was no evidence in the record. As for the \$260,138 profit "passed through" to [REDACTED] the Director cited the CPA's letter stating that [REDACTED] did not expect his income to be reduced by paying the full proffered wage to the Beneficiary because additional billings were expected. The Director concluded that [REDACTED] income was not really available to pay the Beneficiary and the anticipation of additional billings was merely an expectation that does not establish the Petitioner's ability to pay the proffered wage.

On November 25, 2015, the Petitioner filed the instant appeal, together with a letter from counsel. The Petitioner did not submit any additional evidence of its ability to pay the proffered wage on appeal.

II. LAW AND ANALYSIS

The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, as follows:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by the Service.

Thus, the Petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). In this case, the priority date is June 19, 2014.

The Petitioner must establish that its job offer to the Beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the certified ETA Form 9089, the Petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the Beneficiary obtains lawful permanent residence. The Petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the Petitioner to demonstrate financial resources sufficient to pay the Beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will also be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the Petitioner's ability to pay the proffered wage, USCIS first examines whether the Beneficiary was employed and paid by the Petitioner during the period following the priority date. If the Petitioner establishes by documentary evidence that it employed the Beneficiary at a salary equal to or greater than the proffered wage, the evidence is considered *prima facie* proof of the Petitioner's ability to pay the proffered wage.

In this case, the record indicates that the Beneficiary has been employed by the Petitioner since August 31, 2013, but only for 4 hours per week. The Beneficiary's Form W-2 for 2014 shows that he received "wages, tips, other compensation" of \$17,540, which was \$145,199 below the proffered wage of \$162,739 per year. The Beneficiary's pay statements in 2015 show that he was paid a total of \$7350 in wages and a \$360 bonus through the pay period ending April 24, 2015. Thus, the Petitioner has not established its ability to pay the proffered wage from the priority date of June 19, 2014, onward based on the wages actually paid to the Beneficiary. The Petitioner must establish its

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ability to pay the difference between wages paid to the Beneficiary and the proffered wage in each relevant year.

If the Petitioner does not establish that it has paid the Beneficiary an amount at least equal to the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures entered on the Petitioner's federal income tax return(s). If either of these figures equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the Beneficiary in a given year, the Petitioner would be considered able to pay the proffered wage during that year. There is ample judicial precedent for determining a petitioner's ability to pay the proffered wage based on its federal income tax returns. See e.g. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Togatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)).

In the Petitioner's Form 1120S for 2014, net income (or loss) is recorded in Schedule K, line 18 ("Income/loss reconciliation"),¹ while net current assets (or liabilities) are the difference between the Petitioner's current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L. As shown in the tax return, the Petitioner's net loss was -\$35,349 and its net current liabilities were -\$25,971 in 2014. Since the Petitioner had a net loss and net current liabilities in 2014, it cannot establish its continuing ability to pay the difference between wages paid to the Beneficiary and the proffered wage from the priority date of June 19, 2014, onward based on its net income or net current assets.

The Petitioner asserts that it had an additional \$40,085.76 worth of accounts receivable in 2014 for insurance claims that were not collected until 2015. We note, however, that the Petitioner's tax returns were prepared pursuant to the cash method of accounting, in which revenue is recognized when it is received, and expenses are recognized when they are paid. See <http://www.irs.gov/publications/p538/ar02.html#d0e1136> (accessed July 21, 2016). Under the cash method of accounting, the Petitioner must record the insurance collections in 2015; no accounts receivable would have been recorded for the uncollected amounts in 2014. The Petitioner may not shift claims collected in 2015 to a prior year in an effort to show its ability to pay the proffered wage. We conclude, therefore, that the evidence of record does not support the Petitioner's assertion that its current assets in 2014 should be augmented by \$40,085.76 for accounts receivable. Even if the insurance claims had been considered as current assets in 2014, the Petitioner must establish its ability to pay the difference of \$145,199 between the wages paid to the Beneficiary and the proffered wage in 2014. Insurance claims totaling \$40,085.76 would not be sufficient to cover the difference.

The Petitioner claims that its account with [REDACTED] contained additional funds which should be

¹ If an S corporation's income is exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21 of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 (income/loss reconciliation) of Schedule K. In this case, there are relevant entries in Schedule K, so the income/loss figure on line 18 of Schedule K is applicable.

taken into consideration in determining its ability to pay the proffered wage. Reliance on the Petitioner's bank account balance is misplaced. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While the regulation allows additional evidence "in appropriate cases," the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) – specifically, its federal income tax return for 2014 – paints an inaccurate financial picture of the Petitioner at the end of 2014. Finally, no evidence was submitted to demonstrate that the 2014 closing balance reported on the Petitioner's bank statements represents additional funds that were not reflected on the Petitioner's 2014 Form 1120S. Accordingly, the [REDACTED] statements are not persuasive evidence of an additional financial resource that the Petitioner could have utilized to pay the proffered wage to the Beneficiary in 2014 and 2015.

The Petitioner asserts that the officer's compensation of \$260,138 paid to the sole shareholder, [REDACTED] in 2014 (as recorded on page 1, line 7, of the 2014 Form 1120S and in the accompanying IRS Form 1125-E, Compensation of Officers) should be considered available funds to pay the proffered wage to the Beneficiary.² The sole shareholder of an S corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's ordinary business income or loss reflected on Form 1120S. However, in this case, [REDACTED] has not personally indicated a willingness to forgo a large portion of his officer compensation to pay the proffered wage. In a letter dated February 11, 2015, from [REDACTED] submitted in support of the petition, [REDACTED] does not indicate his willingness to forgo a portion of his officer compensation to pay the proffered wage. Additionally, a letter dated February 26, 2015, from [REDACTED] CPA, noted the amounts of officer compensation paid to [REDACTED] in 2012, 2013, and 2014, and stated that "[REDACTED] does not expect a drop in his salary by hiring [the Beneficiary] as a full-time employee." [REDACTED] does not indicate that [REDACTED] would be willing to forgo a large portion of his officer compensation. We cannot conclude from the evidence that [REDACTED] would be willing to forgo a portion of his officer compensation to pay the difference between the proffered wage and the wages paid to the Beneficiary.

Even if [REDACTED] had indicated his willingness to forgo a portion of his officer compensation to pay the proffered wage, he must also show that he has the ability to forgo that income. To obtain a complete picture of [REDACTED] financial situation, we must also consider his personal liabilities and ongoing costs of living. We note that [REDACTED] 2014 Form 1040 lists four dependents, including his wife and three children. His 2014 Form 1040 had an entry of \$60,000 for alimony paid and showed itemized expenses of \$35,541. There is no additional evidence in the record of [REDACTED] liabilities and ongoing costs of living, such as mortgage and insurance obligations, monthly household expenses, and other living costs. Thus, it is not possible to draw a complete picture of [REDACTED] financial situation. The difference between the proffered wage and the amount actually paid to the Beneficiary for his part-time work in 2014, as previously stated, was \$145,199. That figure is more than half of [REDACTED] officer's compensation in 2014. Absent any further evidence of [REDACTED] liabilities and living expenses, or additional assets and sources of income, we are not

² [REDACTED] 2014 Form 1040 had an entry for "wages, salaries, tips, etc." of \$245,638 (line 7 of the Form 1040).

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persuaded that [REDACTED] was able to forgo more than half of his income in 2014 to pay the difference between the proffered wage and the wages paid to the Beneficiary. The same analysis applies in 2015, based on the Beneficiary's pay statements showing that he continued to be paid at only a fraction of the proffered wage rate, presumably because he was still working part-time.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the Petitioner states that it has been in business since 2002 and has five employees. On its federal income tax returns for 2013 and 2014, the Petitioner recorded gross receipts of \$502,450 and \$574,424, respectively. [REDACTED] indicates that the Petitioner's "pass through profit or (losses) for the Practice for the years ended 2014, 2013, and 2012 were (\$37,320), \$32,370 and (\$7678), respectively. Thus, the business was modest in size and income in 2013 and 2014, and there is no evidence of its financial situation before 2013. Accordingly, the documentation of record does not show a historic pattern of growth. The record does not contain evidence of the Petitioner's reputation within its industry, or the occurrence of any uncharacteristic business expenditures or losses. Based on the evidence of record, we determine that the Petitioner has not established that the totality of its circumstances, as in *Sonogawa*, demonstrates its ability to pay the \$145,199 shortfall between the proffered wage and the wages actually paid to the Beneficiary in 2014, or that the Petitioner could have paid the substantial shortfall in 2015 either.

The Petitioner has not established its continuing ability to pay the proffered wage of the job offered from the priority date up to the present. The appeal will therefore be dismissed.

III. CONCLUSION

When USCIS examines a petitioner's ability to pay the proffered wage, the fundamental focus of our determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977). Based on the evidence of record in this case, we conclude that the Petitioner has not established its continuing ability to pay the proffered wage of \$162,739 per year from the priority date of June 29, 2014, up to the present.

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

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ORDER: The appeal is dismissed.

Cite as *Matter of S-N-M-A-, P.A.*, ID# 17900 (AAO Aug. 1, 2016)